A

TAY KOK WAH

v.

PP

B

COURT OF APPEAL, PUTRAJAYA
SULAIMAN DAUD JCA
SYED AHMAD HELMY JCA
MOHAMED APANDI ALI JCA
[CRIMINAL APPEAL NO: B-05-90-2010]

C

25 JANUARY 2012

CRIMINAL LAW: *Murder - Penal Code, s. 302 - Prima facie case - Whether established - Whether there was break in chain of evidence of blood samples - Whether created reasonable doubt on DNA evidence -*

D

Whether trial judge misdirected himself when accepting evidence of witness who was accessory before and after fact - Whether there was maximum evaluation of evidence - Failure of prosecution to call material witnesses - Whether triggered adverse presumption under s. 114(g) Evidence Act 1950 - Whether circumstantial evidence insufficient to sustain finding of

E

appellant's guilt

CRIMINAL PROCEDURE: *Appeal - Appeal against conviction and sentence - Murder - Whether there was break in chain of evidence of blood samples - Whether created reasonable doubt on DNA evidence -*

F

Whether trial judge misdirected himself when accepting evidence of witness who was accessory before and after fact - Whether there was maximum evaluation of evidence - Failure of prosecution to call material witnesses - Whether triggered adverse presumption under s. 114(g) Evidence Act 1950 - Whether circumstantial evidence insufficient to sustain finding of

G

appellant's guilt

The appellant was convicted for the offence of murder under s. 302 of the Penal Code and sentenced to death. The High Court held that the prosecution had established the charge of murder against the accused beyond a reasonable doubt.

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Dissatisfied, the appellant raised four main grounds of appeal (i) that the prosecution had failed to satisfy the court that the protocols in ensuring that the various blood samples were not mixed up to the prejudice of the appellant and that failure to call relevant doctors who handled the blood samples had caused a

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broken-chain in respect of the vital DNA evidence; (ii) the trial judge had misdirected himself when he accepted the evidence of SP14 at face value as SP14 was an accessory before and after

the fact; (iii) the trial judge ought to have invoked the adverse inference against the prosecution for failing to call or at least offer witnesses, one Thanabalan and one Ngendran, for purposes of cross-examination; and (iv) the trial judge had erred on the burden of proof imposed on the appellant and made it worse by invoking s. 114(g) adverse inference against the appellant for failing to call the earlier mentioned two witnesses that ought to have been called by the prosecution.

Held (allowing the appellant's appeal; setting aside conviction and sentence)
Per Mohamed Apandi Ali JCA delivering the judgment of the court:

(1) Blood samples were taken from all the individuals on the basis of being suspects in the police investigations of the case by three different doctors. There were no evidence as to whether there was any labelling done by the doctors or by others who handled the blood samples before they came into the possession of the Investigating Officer. There was thus a break in the chain of evidence of the blood samples, which in the circumstances of the case, when the prosecution is relying on scientific analysis or DNA, was fatal as such break had created a reasonable doubt on the DNA evidence. To preserve the integrity of the exhibits where the prosecution relied heavily on DNA evidence, it was essential for the prosecution to maintain the chain of evidence of the exhibits. (paras 14 & 15)

(2) SP14's evidence should have been taken with caution as he was arrested as a suspect and was an accessory before the fact. SP14 had helped the appellant gain entry into the house, namely by removing the window panes and also by bending the grilles with a hoe. SP14 was also an accessory after the fact, in helping to hide the car stolen from the deceased. The trial judge's brief comment of SP14's evidence was not a reflection of an exercise of maximum evaluation of SP14's evidence. Nowhere in the trial judge's grounds of decision was there an indication that he had exercised such maximum evaluation of SP14's evidence. (para 16)

(3) Both Ngendran and Thanabalan were material witnesses as they were accessories before the fact and were arrested for the very offence which the appellant was charged with and had their blood samples taken for purposes of DNA evidence.

The failure of the prosecution to call them, or offer them for cross examination or to tender their s. 112 statements, in the circumstances of the evidence as a whole, triggered the adverse presumption under s. 114(g) of the Evidence Act 1950. (para 18)

(4) The trial judge, instead of invoking the adverse inference against the prosecution, had invoked such adverse inference against the appellant. The above approach was contrary to substantive criminal law and procedure. It is trite law that an accused person need not prove anything, but only to raise a reasonable doubt. It is also settled law that no adverse inference could be drawn against an accused person if he offered no evidence. It is never the duty upon an accused to call any evidence. (paras 21, 23 & 25)

(5) The circumstantial evidence herein was insufficient and not strong enough to sustain the finding of guilt of the appellant. The shortcomings in the prosecution's case and the errors of the trial judge inevitably made the conviction of the appellant unsafe. The inferences by the trial judge were not reasonably and properly drawn from the evidence adduced at the trial. Inferences of facts, particularly in a case solely based on circumstantial evidence could not be one of either or. It had to be one inference only. To blow hot and cold at the same time is a sure reflection of lingering doubt in the prosecution's case. The benefit of such doubt ought to be given to the appellant. Thus, the appellant was acquitted and discharged for the alleged offence of murder. (paras 27, 29 & 30)

Bahasa Malaysia *Translation of Headnote*

Perayu disabitkan dengan kesalahan membunuh di bawah s. 302 Kanun Keseksaan dan dihukum mati. Mahkamah Tinggi memutuskan bahawa pihak pendakwaan telah membuktikan kesalahan bunuh terhadap perayu melampaui keraguan munasabah. Tidak puas hati, perayu membangkitkan empat alasan utama rayuan: (i) pihak pendakwaan gagal memuaskan mahkamah bahawa protokol dalam memastikan pelbagai sampel darah tidak tercampur untuk memprejudiskan perayu dan kegagalan memanggil doktor-doktor relevan yang mengendalikan sampel-sampel darah telah menyebabkan rantaian keterangan terpatah berhubungan keterangan DNA penting; (ii) hakim bicara telah tersalah arah

apabila menerima keterangan SP14 pada nilai muka kerana SP14 merupakan rakan subahat sebelum dan selepas fakta; (iii) hakim bicara sepatutnya membuat inferens bertentangan terhadap pihak pendakwaan kerana gagal memanggil atau sekurang-kurangnya menawarkan saksi-saksi, iaitu Thanabalan dan Ngendran, bagi maksud pemeriksaan balas dan (iv) hakim bicara telah khilaf pada beban bukti dan telah memburukkan lagi keadaan dengan mengenakan inferens bertentangan s. 114(g) terhadap perayu atas kegagalannya memanggil saksi-saksi tersebut yang sepatutnya dipanggil oleh pihak pendakwaan.

Diputuskan (membenarkan rayuan perayu; mengenepikan sabitan dan hukuman)
Oleh Mohamed Apandi Ali HMR menyampaikan penghakiman mahkamah:

(1) Tiga doktor berbeza telah mengambil sampel-sampel darah dari individu-individu tertentu atas dasar sebagai suspek di dalam penyiasatan polis kes ini. Tiada keterangan sama ada pelabelan telah dilakukan oleh doktor-doktor atau sesiapa yang terlibat dalam pengendalian sampel-sampel darah sebelum ia sampai ke Pegawai Penyiasat. Oleh itu, terdapat kelompangan dalam rangkaian keterangan sampel-sampel darah, yang dalam hal keadaan kes itu, apabila pihak pendakwaan bergantung kepada analisis saintifik atau DNA, adalah fatal kerana kelompangan sebegitu telah mewujudkan keraguan munasabah ke atas keterangan DNA. Untuk memelihara integriti di mana pihak pendakwaan bergantung kepada keterangan DNA, adalah penting untuk pihak pendakwaan mengekalkan rangkaian keterangan eksibit-eksibit.

(2) Keterangan SP14 harus diterima dengan penuh berhati-hati kerana SP14 telah ditangkap sebagai suspek dan adalah rakan subahat sebelum fakta. SP14 telah membantu perayu memasuki ke dalam rumah, iaitu dengan mengeluarkan anak tetingkap dan juga dengan membengkokkan gril dengan menggunakan cangkul. SP14 juga adalah rakan subahat selepas fakta, dalam menolong menyembunyikan kereta yang dicuri dari simati. Ulasan yang pendek oleh hakim bicara mengenai keterangan SP14 tidak mencerminkan pelaksanaan penilaian maksimum keterangan SP14. Tidak terdapat mana-mana dalam alasan keputusan hakim bicara yang menunjukkan bahawa beliau telah melaksanakan penilaian maksima ke atas keterangan SP14.

(3) Kedua-dua Ngendran dan Thanabalan adalah saksi-saksi material kerana mereka rakan-rakan subahat sebelum fakta dan ditangkap bagi kesalahan sama seperti perayu dan sampel-sampel darah mereka diambil untuk tujuan DNA. Kegagalan pihak pendakwaan memanggil mereka, atau menawarkan mereka untuk pemeriksaan balas atau pengemukaan kenyataan s. 112 mereka, dalam keadaan keterangan secara keseluruhannya, mencetuskan anggapan bertentangan di bawah s. 114(g) Akta Keterangan 1950.

(4) Hakim bicara, daripada menggunakan inferensi bertentangan terhadap pihak pendakwaan, telah menggunakan inferensi bertentangan terhadap perayu. Pendekatan di atas adalah bertentangan dengan undang-undang jenayah dan prosedur substantif. Adalah undang-undang mantap bahawa seorang tertuduh tidak perlu membuktikan apa-apa, tetapi hanya perlu membangkitkan keraguan munasabah. Ia juga undang-undang termaktub bahawa inferens bertentangan tidak boleh digunakan terhadap orang tertuduh jika tertuduh tidak memberi keterangan. Ia tidak pernah menjadi tanggungjawab tertuduh untuk memanggil apa-apa keterangan.

(5) Keterangan ikut keadaan di sini tidak mencukupi dan tidak cukup kuat untuk mengekalkan dapatan perayu bersalah. Kelemahan yang terdapat dalam kes pendakwaan dan kesalahan-kesalahan hakim bicara membuatkan sabitan perayu tidak selamat. Inferens-inferens oleh hakim bicara tidak dibuat dengan munasabah dan betul dari keterangan yang dikemukakan semasa perbicaraan. Inferens-inferens fakta, terutama dalam kes yang berdasarkan semata-mata atas keterangan ikut keadaan, tidak boleh menjadi salah satu dan atau. Ia harus menjadi satu inferens sahaja. Ketidaktetapan pendirian pihak pendakwaan pada masa yang sama pasti mencerminkan keraguan yang berpanjangan di dalam kesnya. Manfaat keraguan itu harus diberi kepada perayu. Oleh itu, perayu dilepaskan dan dibebaskan dari kesalahan bunuh yang didakwa.

Case(s) referred to:
Abu Bakar v. Regina [1963] 1 LNS 4 HC ***(refd)***
Abdul Aziz Lela v. PP [2011] 7 CLJ 1 CA ***(foll)***
Baharom v. PP [1960] 1 LNS 9 HC ***(refd)***
Chan Chwen Kong v. PP [1962] 1 LNS 22 HC ***(foll)***
Goh Ah Yew v. PP [1948] 1 LNS 13 HC ***(refd)***

Khoon Chye Hin v. PP [1961] 1 LNS 41 HC ***(refd)***
Pang Chee Meng v. PP [1992] 1 CLJ 39; [1992] 1 CLJ (Rep) 265 SC ***(refd)***
PP v. Chia Leong Foo [2000] 4 CLJ 649 HC ***(refd)***
PP v. Tan Gong Wai & Anor [1984] 1 LNS 137 HC ***(refd)***
Seneviratne v. R [1963] 3 All ER 36 ***(refd)***
Tan Foo Su v. PP [1967] 1 LNS 179 HC ***(refd)***
Teoh Hoe Chye v. PP & Another Case [1987] 1 CLJ 471; [1987] CLJ (Rep) 386 SC ***(refd)***

Legislation referred to:
Evidence Act 1950, ss. 112, 114(g)
Penal Code, ss. 302, 376

For the appellant - Hisyam Teh Poh Teik; M/s Teh Poh Teik & Co
For the respondent - Tengku Amir Zaki Tengku Abdul Rahman DPP

[Appeal from High Court, Shah Alam; Criminal Trial No: 45-51-2008]

Reported by Suhainah Wahiduddin

JUDGMENT

Mohamed Apandi Ali JCA:

Introduction

[1] The appellant was convicted for the offence of murder under s. 302 of the Penal Code and sentenced to death. The charge against the appellant reads as follows:

> Bahawa kamu, pada 2 Ogos 2007, jam lebih kurang 4.30 pagi di rumah beralamat No. 27 Jalan Putra 4/1, Seksyen 1 Bandar Mahkota Cheras, Kajang dalam Daerah Kajang, dalam Negeri Selangor, telah membunuh Tang Lai Meng No. Kad Pengenalan 871004-08-5384 dan dengan itu kamu telah melakukan suatu kesalahan yang boleh dihukum di bawah seksyen 302 Kanun Keseksaan.

[2] The appellant was also charged for an offence under s. 376 of the Penal Code, which was alleged to have taken place at the same place and time and in respect of the same victim, namely the deceased in the murder charge.

[3] At the end of the prosecution case, the learned trial judge found that there was no *prima facie* case in respect of the charge under s. 376 of the Penal Code and accordingly acquitted and

A discharged the appellant in respect of the charge. However, based on the same facts and evidence, the learned trial judge found that there was a *prima facie* case in respect of the murder charge. The trial then proceeded in respect of the murder charge only, which concluded with the appellant's conviction. It is noted that there B was no appeal against the acquittal in respect of the rape charge by the prosecution.

Factual Background

C **[4]** From what was stated in the opening speech the prosecution had intimated that they are relying on circumstantial evidence and forensic evidence to prove their case. It was also intimated that evidence will be adduced to show that it was the appellant who forcibly entered the house of the deceased and committed the offences of rape and murder of the deceased.
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[5] The facts of the case are well set out in the trial judge's grounds of judgment. We do not intend to repeat them. The salient facts of forced entry into the house of the deceased was adduced through SP14, who assisted the appellant to gain entry. E The evidence of the commission of the offence was adduced through circumstantial evidence as testified by the crime scene investigator, SP17, the forensic analyst, SP18 and the pathologist, SP16.

F **[6]** The cause of death was due to "Asphyxia due to gagging with cloth".

Finding By The High Court

[7] The learned trial judge made the following findings of facts:
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(a) That although the appellant was assisted by SP14 to gain entry into the house of the deceased, it was only the appellant who went into the house.

H (This conclusion was deduced from the discovery of the appellant's fingerprints on the window panes at the rear of the house.)

(b) That the appellant was physically present in the bedroom of the deceased on the material date.
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(This was deduced from the DNA profile of semen stain on the bed sheet, which matched with the DNA of the appellant.)

(c) That the victim had suffocated to death because a pillow case was stuffed into her mouth and that caused the death due to asphyxia.

[8] In arriving at such findings, the learned trial judge wrote in his judgment, as follows:

> In coming to the *prima facie* finding that the accused was the person who had caused the victim's death, the court is relying on circumstantial evidence *viz*. the fingerprints of the accused found on the window panes of the kitchen window of the victim's house and the DNA of the accused recovered from the semen stain found on the bed sheet of the victim's bed.
>
> The circumstantial evidence read with the testimony of SP14 that the accused had broken into and entered the victim's house on 2.8.2007, lead the court to only one conclusion *viz*. that the accused was the person that had forcefully tied up the victim, stuffed a pillow case into her mouth and tied another pillow case around her neck thus causing the victim to suffocate to death.

[9] In his defence, the appellant narrated that on the early morning of the incident; he went to the victim's house together with SP14, Thanabalan and Ngendran. Their common intention was to break in and steal the victim's laptop. According to the appellant, Ngendran acted as a look-out and it was Thanabalan and SP14 who entered the victim's house. The appellant did not enter the house as he was afraid that he might be identified by the victim because he had on several occasion prior to the incident have had consensual sexual relationship with the victim.

[10] The learned trial judge dismissed the appellant's version as improbable and in the course of such findings invoked the adverse inference under s. 114(g) of the Evidence Act against the appellant, for failing to call the two accomplices, namely Thanabalan and Ngendran.

[11] For the above reasons, the High Court held: "that the prosecution has established the charge of murder against the accused beyond a reasonable doubt."

Contentions By The Appellant

[12] Learned counsel for the appellant raised four main grounds of appeal:

(1) That the prosecution has failed to satisfy the court that the protocols in ensuring that the various blood samples were not mixed up to the prejudice of the appellant.

Corollary to this ground, it was also submitted that the failure to call the doctors and one Sjn. Samsiah who handled the blood-samples had caused a broken-chain in respect of the vital DNA evidence;

(2) That the learned trial judge misdirected himself when he accepted the evidence of SP14, Nathan Kumar, at face value. This is particularly so, when SP14 is an accessory before and after the fact;

(3) That the learned trial judge ought to have invoked the adverse inference against the prosecution for failing to call or at least offer both Ngendran and Thanabalan for purposes of cross-examination; and

(4) That the trial judge had erred on the burden of proof imposed on the appellant and made it worse by invoking the s. 114(g) adverse inference against the appellant for failing to call the earlier mentioned two witnesses that ought to have been called by the prosecution.

Our Analysis And Findings

[13] We shall deal with the respective grounds put forward by the appellant.

[14] Ground No. (1): It is clear from the evidence that the prosecution had relied heavily on DNA evidence to prove its case against the appellant. This was intimated by the prosecution in their opening speech, exh. P3. Blood samples of six individuals were taken for DNA analysis. This piece of evidence was adduced through SP19, DSP Chung Chin Mok, the investigating officer of this case. The six individuals from which blood samples were taken and marked as exhibits are as follows:

(i) Puan Wing Kah, SP15 and whose blood samples were marked as P50A and P50B;

(ii) Ngendran (not called as a witness) and whose blood samples were marked as P51A and P52B;

(iii) Thanabalan (also not called as a witness) and whose blood samples were marked as P52A and P52B;

(iv) Nathan Kumar, SP14 and whose blood samples were marked as P53A and P52A;

(v) Tay Kok Wah, the appellant, and whose blood samples were marked as P30B and P30C;

(vi) Tan Lai Meng, the deceased victim and whose blood samples were marked as P31B, P31C, P31D and P31E.

Except for the deceased victim, the blood samples were taken from all the individuals on the basis of being suspects in the police investigations of the case. The blood samples were taken by no less than three different doctors. Except for one Dr Shanti Kantasamy (who was not called as a witness) who took the blood samples of the appellant, the other doctors were not identified. In evidence, it was also disclosed that all the blood samples were handed over to one Sjn. Samsiah before they were handed over to the IO SP19. There were no evidence as to whether there was any labelling done by the doctors or by others who handled the blood samples before they came into the possession of the IO. There was also no evidence as to the movement of the blood samples from the moment the samples were taken by the unidentified doctors to the point when they were handed over to the IO. The last person who handled the blood samples, Sjn. Samsiah, before the blood samples were handed over to the IO was also not called.

[15] From the above evidence, it is our judgment that there is a break in the chain of evidence of the blood samples, which in the circumstances of the case, when the prosecution is relying on scientific analysis or DNA, is fatal as such break had created a reasonable doubt on the DNA evidence. To preserve the integrity of the exhibits where the prosecution relied heavily on DNA evidence, it is essential for the prosecution to maintain the chain of evidence of the exhibits. On this issue, we could not agree more with what was held by the Court of Appeal in *Abdul Aziz Lela v. PP* [2011] 7 CLJ 1.

[16] Ground No. (2): SP14's evidence should have been taken with caution. This is so as he was arrested as a suspect and was an accessory before the fact. It was not in dispute that SP14 did help the appellant to gain entry into the house, namely by removing the window panes and also by bending the grilles with a hoe. SP14 was also an accessory after the fact, in helping to hide

A the car stolen from the deceased. To evaluate the truthfulness of SP14's story of going to sleep after helping to bend the grilles at the victim's house on the morning of the incident, it is appropriate to test it with the actions of SP14 both before and after the event. It is incumbent to appreciate the probable reason as to
B why SP14 was distancing himself from the crime scene. Is SP14's story reasonable? If there is doubt as to its truthfulness, SP14 could not be taken as a witness of truth. Nowhere in the learned trial judge's grounds of decision that indicated that he had exercised such maximum evaluation of SP14's evidence. The trial
C judge's brief comment of SP14's evidence consisted of three sentences only, which reads as follows:

> The court finds that SP14's testimony is consistent and credible that he had merely assisted the accused in entering the victim's
D house upon the request of the latter. SP14 was never the accomplice of the accused in the murder of the victim. The court is therefore able to accept the testimony of SP14 in establishing the fact that the accused alone had broken into and entered the victim's house upon the request of the latter. SP14 was never the accomplice of the accused in the murder of the victim. The court
E is therefore able to accept the testimony of SP14 in establishing the fact that the accused alone had broken into and entered the victim's house on 2.8.2007.

[17] It is our judgment that such brief comment is not a
F reflection of an exercise of maximum evaluation of SP14's evidence.

[18] Grounds No. (3): It is our judgment that both Ngendran and Thanabalan are material witnesses as they were accessories before the fact and were arrested for the very offence which the
G appellant was charged with and had their blood samples taken for purposes of DNA evidence. The failure of the prosecution to call them, or offer them for cross-examination or to tender their s. 112 statements, in the circumstances of the evidence as a whole, would have triggered the adverse presumption under s. 114(g) of
H the Evidence Act 1950.

[19] The evidence of both Ngendran and Thanabalan may have been kept away by the prosecution because they may not pass the test of witnesses of truth (see *Khoon Chye Hin v. PP* [1961]
I 1 LNS 41). But from the facts of this case, namely their roles prior to the entry into house of the victim make their evidence as

essential to unfold the narrative upon which the prosecution case is based on (see *Seneviratne v. R* [1963] 3 All ER 36 and *Teoh Hoe Chye v. PP & Another Case* [1987] 1 CLJ 471; [1987] CLJ (Rep) 386).

[20] Furthermore, since other suspects were arrested during the course of the investigations into this case, the prosecution does have a duty to adduce evidence to eliminate the involvement of the other suspects. There must be irresistible evidence that despite the presence of others, all evidence must point to the guilt of the accused person. Not having discharged its burden the adverse inference can therefore be drawn on the prosecution's failure to call these two witnesses.

[21] Grounds No. (4): This last ground is inter-related with ground No. (3) above. It is to our astonishment that the learned trial judge, instead of invoking the adverse inference against the prosecution, did invoke such adverse inference against the appellant.

[22] The learned trial judge in his grounds of judgment, under a sub-heading: Failure to call corroborating witnesses, wrote:

> The burden of calling witnesses to corroborate the testimony of the accused is upon the accused and not the prosecution. The prosecution has *prima facie* established the ingredients of the charge of murder against the accused. The burden has shifted to the accused to substantiate his testimony by calling the alleged accomplices to testify *viz.* Thanabalan and Ngendran. These two alleged accomplices could be called to counter the testimony of SP14. However, the accused has chosen not to do so. The court finds that Section 114(g) of the Evidence Act 1950 is not operated against the prosecution evidence but that of the accused.

[23] It is our judgment that the above approach is contrary to substantive criminal law and procedure. It is trite law that an accused person need not prove anything, but only to raise a reasonable doubt (see *PP v. Tan Gong Wai & Anor* [1984] 1 LNS 137; *Pang Chee Meng v. PP* [1992] 1 CLJ 39; [1992] 1 CLJ (Rep) 265).

[24] The burden of proof may shift to the accused person, where the substantive law provides the presumption of law where such provisions presumed the fact as proved until evidence to the contrary is given. This is so in drug cases and corruption cases.

A But the case at hand is in respect of murder, of which there is no such presumptive provision (see *Baharom v. PP* [1960] 1 LNS 9; *PP v. Chia Leong Foo* [2000] 4 CLJ 649).

[25] It is also settled law that no adverse inference can be drawn B against an accused person if he offers no evidence. It is never the duty upon an accused to call any evidence. (See: *Goh Ah Yew v. PP* [1948] 1 LNS 13; *Abu Bakar v. Regina* [1963] 1 LNS 4; *Tan Foo Su v. PP* [1967] 1 LNS 179.)

C **[26]** On this issue, for completeness, we feel that it is appropriate to quote Raja Azlan J (as HRH then was) in *Tan Foo Su, supra*; which reads as follows:

> It is the duty of the court to consider the defence story which may produce one of three results, namely, that if the court is D convinced of the truth of the accused's story or that it created a reasonable doubt as to guilt, then the court must acquit the accused person. Sometimes the defence story strengthens the prosecution case and in that case the court has to find the accused guilty. But it is not the duty of the accused person to prove his innocence, far less to produce or to bring a particular E witness to support his story. Failure of the defence to produce a particular witness must not be made the subject of adverse comment by the court, otherwise it would amount to a misdirection. In my view, the learned magistrate overlooked the authorities on that point which are afforded by the case of *Goh* F *Ah Yew v. Public Prosecutor* [1949] MLJ 153 and the case of *Abu Bakar v. R.* [1963] MLJ 288 where the comment made by the trial district judge in the latter case is almost similar to the present case. In that case the appellate court said that there is no duty cast upon the defence in a criminal case to call any evidence and no inference unfavourable to him can be drawn. There the learned G trial district judge appeared to have drawn an unfavourable inference because the absent witness was not called by the defence. And so in this particular case. If the learned magistrate had not over-looked those two authorities I am sure he would not have misdirected himself on this point.

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Conclusion

[27] Since the prosecution's case relied on circumstantial evidence, we have to adequately caution ourselves, in line with what was said about "combined strength of strands to make a I rope strong enough to hang" in *Chan Chwen Kong v. PP* [1962] 1 LNS 22. We find that the circumstantial evidence are insufficient

and not strong enough to sustain the finding of guilt of the appellant. Considered cumulatively, the uncertainty in the evidence relating to the blood samples which formed the vital link to implicate the appellant and leading to the questionable integrity of the DNA findings and the fundamental error of invoking adverse inference against the appellant for his failure to call two witnesses, we are not satisfied that the prosecution had proved its case beyond reasonable doubt. The shortcomings in the prosecution's case and the errors of the learned trial judge, as discussed above, would inevitably make the conviction of the appellant unsafe.

[28] We also could not see any parallel as to how the appellant who was charged for rape of the victim was acquitted and discharged without calling for his defence, when the prosecution's case was based on the very same circumstantial evidence, forensic evidence and the evidence of SP14. It is rather odd for the court to hold that the appellant have had the opportunity to commit murder when he was acquitted for rape of the victim when the same evidence was relied upon.

[29] This paradox, in our judgment, is an indication of incorrect findings of fact. The inferences by the learned trial judge were not reasonably and properly drawn from the evidence adduced at the trial. Inferences of facts, particularly in a case solely based on circumstantial evidence cannot be one of either or. It has to be one of inference only. To blow hot and cold at the same time is a sure reflection of lingering doubt in the prosecution's case. The benefit of such doubt ought to be given to the appellant. This observation is in addition to our findings of doubts as per our analysis of the evidence, as discussed earlier in the judgment.

[30] For the above reasons, we unanimously allowed the appeal by the appellant. The conviction and sentence is hereby set aside and in place we accordingly ordered that the appellant to be acquitted and discharged for the alleged offence of murder.